IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1704

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY,

APPELLANT,

v.

LOUIS J. FIOTO, et al.

APPELLEE.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellee, pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United States, moves that the final judgment and order of the District Court be affirmed on the ground that the decision of the District Court is so obviously correct as to warrant no further review by this Court.

OPINION BELOW

The opinion and judgment of the District Court are set forth in Appendices A, B, and C of appellant's jurisdictional statement.

JURISDICTION

The jurisdictional requisites are set forth in appellant's jurisdictional statement.

QUESTION PRESENTED

Whether 10 USC §1331(c) of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, on its

face and as applied to plaintiff and his class is unconstitutional as violative of the Due Process Clause of the Fifth Amendment in excluding from eligibility for retirement pay persons who served twenty years of satisfactory service after August 16, 1945 and satisfied all requirements for such retirement pay except that they had also been members of the National Guard or the Reserve prior to August 16, 1945, and had not served on active duty during World War I, World War II or the Korean Conflict.

STATUTE INVOKED

Pertinent provisions of 10 USC §1331 are set forth in appellant's Jurisdictional Statement at pages 2 and 3.

STATEMENT

The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, as amended, 10 USC §1331 et seq., grants retired pay for reservists and national guardsmen who meet certain age and service requirements including the requirement that they have reached 60 years of age and have served 20 years as computed under the service and point system of §1332. The challenged proviso at 10 USC §1331(c) sets forth the additional eligibility requirement that any reservist or guardsmen who has years of service before August 16, 1945 must also have performed active duty during either World War or the Korean Conflict; otherwise that person is completely disqualified from receiving retirement benefits to which he is otherwise entitled.

Appellee Fioto is presently retired from service in the United States Army. Appellee served in the United States Coast Guard from 1927 to 1931. He served in the Army National Guard from 1933 to 1940 and again from 1947 to 1967. He received an Honorable Discharge on December 9, 1967, having reached the mandatory age of 60.

On September 5, 1967, appellee filed an application for retired pay for non-regular service pursuant to 10 USC §1331(a). The Army denied his application. By letter dated September 25, 1974, the Army Board of Correction of Military Records denied appellee's final application.

Appellee then commenced this action for declaratory and injunctive relief in the United States District Court for the Eastern District of New York, seeking class certification and the convening of a three-judge court.

Judge Bruchhausen as the convening judge, entered an order certifying a class. The class consists only of those reservists who have twenty years of qualifying service after August 16, 1945, as computed under the standards in 10 USC §1332,and are otherwise entitled to retired pay, except that because they have additional years of reserve service before August 16, 1945, and did not perform active wartime duty they are disqualified from receiving benefits by reason of 10 USC §1331(c). 1/

The three-judge court, per Circuit Judge Lumbard, granted appellee's motion for summary judgment holding that as applied to plaintiff and the members of his class §1331(c) violates the minimum requirements imposed by the Due Process Clause of the Fifth Amendment. (District Court Decision, Appellant's Appendix at 5a.)

The District Court found that Congress had not intended to create a purely arbitrary distinction between those who had pre-1945 service and those who had not, but rather had "adopted the reasonable requirement that an individual serve twenty 'satisfactory' years, as measured by an objective standard." (Id. at 6a, fn. omitted.) The Court observed

1/ See opinion of the District Court fn. 1 as amended (Appellant's Jurisdictional Statement, Appendix B, at 9a). Of course, the particular reason why appellee Fioto, or any other member of the class, did not serve on active duty is not a question common to the class and is not relevant to the Constitutional question herein.

that the objective standard is the 50 point per year system set forth at 10 USC §1332. Prior to the passage of the Bill there was no way to determine a "satisfactory" year. Congress sought to discount the years prior to World War II where there was no way to measure whether service was "satisfactory." "An understandable exception was provided for those who had seen active duty during one of the World Wars." (Id. at 7a.) The Court thus concluded that Congress never intended additional pre-1945 service to be a perpetual bar to benefits.

As is noted in the decision below, it is undisputed that if appellee Fioto's service in the National Guard had been limited to years 1947 to 1967, he would be entitled to retirement pay. The Court found that the challenged proviso is unconstitutional and that Fioto's earlier service from 1933 to 1940 could not constitutionally bar him from all benefits.

ARGUMENT

The Court below correctly concluded that appellee and his class are being denied the equal protection of the law because without rational basis they are denied eligibility for retired pay which is given to others with the same twenty years of satisfactory service after 1945. This discrimination is not rationally related to any legitimate congressional goal.

This Court has made it clear that the determination of the constitutionality of an Act of Congress must be made in light of the actual purpose of Congress. Jimenez v. Weinberger, 417 US 628, 636, 94 S. Ct. 2496, 2501, 41 L. Ed. 2d 363 (1974), Weinberger v. Wiesenfeld, ___ US ___, 43 L. Ed. 2d 514 (1975). The challenged proviso in 10 USC §1331(c) can not pass constitutional muster because it bears no rational relation to the actual legislative goal of the Act.

After analysis of the legislative history the District Court correctly found that Congress' actual purpose was to provide benefits to those who had satisfactorily served twenty years, thus creating an incentive to continued service. (Appellant's Appendix at 6a.)

The original House Bill intended to confer a benefit and act as inducement to Reserve Service. Hearings on H. R. 2744 before the Senate Committee on Armed Services, 80th Cong. 2d Sess. 13 (1948). The Senate in its amendments set out criteria for 20 years of satisfactory service, but never intended to change the purpose of the House Bill to confer the benefit upon a person who served those 20 years:

> The amendments that are suggested to the bill since it passed the House are all perfecting amendments; none of them change the intent or purposes of the bill as it passed the house.
>
> Statement of Col. Melvin J. Mass, id. at p. 23.

The Senate amendments in general were aimed at defining "satisfactory" service. [2/] This is illustrated by the June 8, 1948, testimony of J. M. Chambers, member of the Committee staff:

> Mr. Chambers. Senator Maybank, perhaps we can best put it this way: Whereas legally it was possible under the House Bill, although I am sure it was never the intent, for persons to qualify practically by doing no service at all the Senate Bill actually requires a tremendous amount of service in the Reserve to qualify for this reserve retirement.
>
> The plan differs markedly from the House in this degree, that each of them require 20 years of so-called satisfactory service. The House version left the term "satisfactory" to be defined by regulations. We have written into this law,

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2/ The objective standards for satisfactory service chosen by Congress are set forth in 10 USC §1332, the District Court sets them forth at fn. 6 (Appellant's Appendix A at 6a.)

and the Reserves have agreed to it, certain standards which are going to be extremely difficult to meet, and these are spelled out in the law.

Id., May 27, 1948, at p. 66.

The Senate amendments, created a system in futuro to measure reserve service in each year and determine whether it was satisfactory. That involved earning 50 qualifying points in each year after 1948. However, the intent of the bill was not to exclude anyone who had 20 years of satisfactory service and in addition had some years of service that were not satisfactory. If an individual missed 50 points in a year he could always obtain them in another year. All that was intended to be required of anyone was 20 years of satisfactory service achieved at some point during his career:

> Sen. Saltonstal. Just to supplement what you say, a man today has got to get 50 points a year for 20 years. If he misses out through sickness or anything else, in any 1 year, in attaining his 50 points he is out of luck on his retirement. Am I correct.
>
> Mr. Chambers. That is correct. He is out of luck insofar as that one year is concerned.
>
> Senator Hill. He could pick it up?
>
> Mr. Chambers. He could serve another year of satisfactory service. When he has acquired 20 years of satisfactory service he would be qualified.

Id. at p. 67.

This is most important. Missing years of satisfactory service was not intended to disqualify:

> Mr. Chambers. ...He would get credit for the points if he got ultimately 20 years of service. A man comes into the reserve at age 25. When he reaches age 45 he has only got 15 years of satisfactory service because for 5 years he was very inactive. He can stay in 5 years longer if he is not forced out by this attrition system, and make up those 5 years which he lost while he was out.

Id., June 8, 1948, at p. 70.

The Senate had no way to measure past service -- service before the 50 point system was created. So they used a criteria of active wartime duty for pre-1945 service:

> Gen. Dahlquist. To qualify for the future, a year of satisfactory service, the man has to have 50 points....
>
> Senator Byrd. How about the past, Sir?
>
> Gen Dahlquist. The past, he gets credit for that as our records show that he was a satisfactory reserve officer; he gets credit for each year that he was a reserve officer.
>
> ******
>
> Senator Maybank. If they have not been in the war, you said they did not get credit.
>
> Gen. Dahlquist. That is right....

Id. at p. 69.

Wartime service was made a criteria for pre-1945 reserve service because there was no other system to judge year by year if service was satisfactory. But as Judge Lumbard noted for the Court below, there is not a shred of evidence to indicate that Congress intended to disqualify any man with 20 years of satisfactory service after 1945. Clearly Congress intended that a reservist who missed the criteria for satisfactory service before 1945 would make it up after 1945 thereby placing him on equal footing with the post-1945 reservist, who can make up any year where he does not have 50 points.

As the District Court concluded, Congress in 1948 never contemplated the possibility of a man who has 20 years of measurable satisfactory service after 1945, and also having reserve service before 1945. If Congress did consider him, there is no reason to assume it would not have given him the same opportunity as other reservists to pick up additional satisfactory years and thereby qualify for benefits.

The bar to benefits imposed on plaintiff and plaintiff class by the challenged proviso was the consequence of legislative oversight. The intent of the bill and amendments was to create criteria for the equalization of retirement benefits for all personnel. The criteria for reservists was meant to be 20 years of satisfactory service.

> Senator Maybank. I want the information for the record. There is no discrimination whatsoever in this bill against any enlisted man, he need not be promoted or anything else, so long as he carries out his 20 years and earns his 50 points.
>
> Id. at p. 67.

General Dahlquist's quote in Appellant's Jurisdictional Statement fn. 7 at 9, is not inconsistent with the Congressional purpose as set forth above. Years of service by a pre-1945 reservist who did not fight in a war would not qualify him for benefits. However, as the Court below emphasizes, those additional years of pre-1945 service could not act as a perpetual bar.

Johnson v. Robison, 415 US 361 (1974),the sole case relied upon by appellant,is inapposite here. In that case, this Court sustained the constitutionality of Congress' distinction between military service and alternative service for purpose of eligibility for educational benefits because it was rational in light of the express Congressional purpose to make the distinction (415 US at 376). In sharp contrast the discrimination worked by the proviso involved here actually defeats the purpose of Congress, as the District Court correctly concluded and is amply demonstrated above.

For these reasons, appellee submits, that the judgment and order of the District Court should be affirmed without further review by this Court. 3/

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3/ Appellant argues that the District Court lacked jurisdiction under the Tucker Act, 28 USC §1346, to award a monetary judgment against the Secretary and further if it had jurisdiction there is doubt whether sovereign immunity was waived because no Act of Congress created a substantive right to retroactive retired pay.

First, the District Court did not rely on the Tucker Act for jurisdiction but rather on 28 USC §1361. Second, unlike U. S. v. Testan, No. 74-753, relied on by appellant, where there was no specific statute giving respondent the benefit of a position he had not been appointed to, here the statute relied upon, 10 USC §1331,grants retirement benefits to appellee and his class but for the proviso which is challenged as unconstitutional. Furthermore, the statute sets the entitlement date for benefits: "(e) Notwithstanding Sec. 8301 of Title 5, United States Code, the date of entitledment to retired pay under this section shall be the date on which the requirements of subsection (a) have been completed." (Emphasis added.) Therefore, once 10 USC §1331(c) was held unconstitutional as applied, the Secretary of the Army must grant appellee and his class retirement benefits as of the date they qualify.

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MOTION FOR LEAVE TO FILE MOTION
TO AFFIRM IN UNPRINTED FORM AND
TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53, Paragraph I, of the Rules of this Court, motion is hereby made that the appellee be allowed to file his motion to affirm in unprinted form and to proceed in forma pauperis for the reasons stated in the attached affidavit of appellee.

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE
TO FILE MOTION TO AFFIRM IN UNPRINTED
FORM AND TO PROCEED IN FORMA PAUPERIS

I, LOUIS J. FIOTO, being first duly sworn, depose and say, in support of my motion for leave to file my motion to affirm in unprinted form and to proceed in this case without being required to prepay costs and fees:

1. I am the appellee in the above-entitled case.

2. The sole sources of income of me and my family are my Social Security benefits and retired pay benefits received as a result of this action. Because of my poverty I am unable to pay the costs involved in the case or give security therefor and still be able to provide myself and my dependents with the necessities of life.

3. The moneys recovered as a result of this action have been entirely used to repay debts acquired when I was not receiving retired pay benefits.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said case is briefly stated as follows: I commenced this action in the United States District Court for the Eastern District of New York, on behalf of myself and others similarly situated seeking a judgment declaring unconstitutional 10 USC §1331(c) on its face and as applied as

violative of my constitutional right to equal protection; seeking a judgment enjoining appellant from applying 10 USC §1331(c) to me or my class; and seeking a judgment directing appellant to grant us retirement benefits pursuant to 10 USC §1331(a). District Judge Bruchhausen convened a Three-Judge Court to hear the constitutional claims presented herein. By judgment dated January 23, 1976, the Court granted my motion for summary judgment and denied appellants' cross-motion for summary judgment. The question presented on this appeal is whether the challenged provision of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, on its face and as applied is unconstitutional in excluding from eligibility for retirement pay those who had met the requirements and served twenty measurable years of satisfactory service after August 16, 1945, but who had also been members of the National Guard or the Reserve prior to August 16, 1945, and had failed to serve on active duty during either World War.

Louis J. Fioto
LOUIS J. FIOTO

Sworn to before me this
31st day of June, 1976.
David Goldfarb

DAVID GOLDFARB
Notary Public, State of New York
No. 43-9022059
Qualified in Richmond County
Commission Expires March 30, 1978